have been no evidence on which the amount of damages on the counterclaim could have been assessed.

In the result the appeal is allowed only to the extent that the award of $1,500 by way of damages on the counterclaim is set aside. The plaintiff company will have the costs of the counterclaim in the court below but there will be no order as to the costs of the appeal.

Thomson L.P. and **Wee Chong Jin C.J. (Singapore)** concurred.

Appeal allowed in part.

LAM SOON CANNERY CO. v. HOOPER & CO.

[F.C. (Thomson L.P., Wee Chong Jin C.J. (Singapore) and Tan Ah Tah F.J.) April 27, 1965]

[Singapore — Federal Court Civil Appeal No. 110 of 1964]

Practice and procedure — Application to adduce further evidence on hearing of appeal — Evidence in possession of parties — Failure to exercise of all proper care and deligence to discover such evidence — Whether such evidence should be adduced on appeal.

Evidence — Further evidence — Application to adduce, on appeal.

This was an application to adduce further evidence on the hearing of an appeal. The evidence sought to be adduced consisted of a number of letters which have passed between the parties and/or their agents, which were in the possession of the applicants or their agents but it was alleged that they were embodied in a very large mass of correspondence and that their existence could not have been discovered even with the exercise of all proper care and diligence.

Held: as the evidence in this case was at all material times in the possession of the applicants it would be wrong for the court to exercise its discretion in their favour.

Cases referred to:—

(1) *Ladd* v. *Marshall* [1954] 1 W.L.R. 1489, 1491.

(2) *Shedden* v. *Patrick* (1869) L.R. 1 H.L. Sc. 470, 545.

FEDERAL COURT.

J. Grimberg for the appellants.

C. L. Duff for the respondents.

Thomson L.P. (delivering oral judgment): This is an application to adduce further evidence on the hearing of an appeal.

It is not necessary to set out in detail the somewhat lengthy and complicated course of the litigation in which the matter arises which, of course, we shall have to consider at a later stage of the proceedings. The present application is simply to adduce further evidence. The evidence in question consists of a number of letters which have passed between the parties and/or their agents. These letters have not been produced at any previous stage of the proceedings and the ground on which it is sought to put them in evidence now is that even with the exercise of due care and diligence their existence could not have been previously discovered.

It is admitted in the supporting affidavit that at all material times the letters have been in the possession of the present applicants or one or other of their agents but it is said they had become embodied in a very large mass of correspondence which had come into existence in the course of a very long and complicated dispute and that their existence could not have been discovered even with the exercise of all proper care and diligence.

It is common ground that applications of this sort are regarded by this court with considerable circumspection and the principles that have been applied in relation to them are stated as follows by Lord Denning in the case of *Ladd* v. *Marshall*:—(1)

> "To justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; secondly, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; thirdly, the evidence must be such as is presumably to be believed or in other words, it must be apparently credible, though it need not be incontrovertible."

I pause to observe that these conditions are not alternative; they are cumulative. The applicants have sought to bring their case within the first of these conditions because it is conceded that it comes within the third and is not denied that it comes within the second.

As regards whether the evidence could have been obtained with reasonable diligence for use at the trial, we have considered what was said by Lord Chelmsford in the case of *Shedden* v. *Patrick*:—(2)

> "It is an invariable rule in all the courts, and one founded upon the clearest principles of reason and justice, that if evidence which either was in the possession of parties at the time of a trial, or by proper diligence might have been obtained, and the case is decided adversely to the side to which the evidence was available, no opportunity for producing that evidence ought to be given by the granting a new trial."

These conditions stated by Lord Chelmsford are stated in the alternative and in our view the present application clearly falls within the first of these alternative conditions. It relates to evidence which was in the possession of the parties at all material times throughout the litigation.

In our view it would be wrong for us to exercise our discretion in favour of the present applicants.

We therefore dismiss the application with costs.

Application dismissed.

Solicitors: *Drew & Napier; Donaldson & Burkinshaw.*